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16 Attorneys for Defendants
 17 AIRWIRE TECHNOLOGIES,
 JON BENGTSON, and DEBASHIS BAGCHI

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

22 ANUBHAV SINGH OBEROI,

Case No. 5:20-cv-00753-EJD

23 Plaintiff,

**JOINT TRIAL SETTING CONFERENCE
 STATEMENT**

24 vs.

25 AIRWIRE TECHNOLOGIES,

Date: December 8, 2022

Time: 11:00 a.m.

Place: Courtroom 4

Judge: Honorable Edward J. Davila

26 Defendant.

27 Complaint Filed: January 31, 2020

28 / Trial Date: None Set

1 Plaintiff Anubhav Singh Oberoi (“Plaintiff” or “Mr. Oberoi”) and Defendant AirWire
2 Technologies (“Defendant,” “AirWire” or “the Company”) (collectively “the Parties”) hereby
3 submit this Joint Trial Setting Conference Statement.

4 **I. JURISDICTION**

5 This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because the
6 parties are citizens of different states. The amount in controversy exceeds \$75,000 exclusive of
7 interest and costs.

8 This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because
9 Plaintiff alleges claims under the FLSA, a law of the United States.

10 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial
11 part of the events giving rise to the claims occurred in this district. Plaintiff was employed within
12 this district.

13 The parties agree that jurisdiction and venue are proper.

14 **II. SUBSTANCE OF THE ACTION**

15 *Plaintiff’s Statement*

16 A.S. Oberoi joined AirWire Technologies as its Vice President of World-Wide Business
17 Development in February of 2016. Starting in July of 2016, the company stopped paying
18 Mr. Oberoi his salary, citing financial struggles. Based on representations by the company’s
19 CEO, Debashis Bagchi, and Board Chairman and CFO, Jon Bengtson, that imminent influxes of
20 capital would allow AirWire to pay him back soon, Mr. Oberoi continued working for the
21 company without receiving his salary. In order to survive, Mr. Oberoi depleted his savings and
22 drained his 401k accounts.

23 While the company sporadically made small payments to him, it continued to employ him
24 without paying him his salary for almost two years. By March of 2018, the company’s own
25 payroll correspondences confirmed that Mr. Oberoi was owed almost \$250,000 in accrued back
26 pay. This amount has grown considerably since then on account of prejudgment interest,
27 attorney’s fees, and the damages associated with Plaintiff’s statutory claims.

28 ///

1 In March of 2018, Mr. Bengtson circulated to Mr. Oberoi and his colleagues a
2 memorandum that purported to retroactively notify them that the company had “ceased to accrue
3 salary” as of December 31, 2017, despite the fact that Mr. Oberoi had continued to work for the
4 company through the March 2018 date the memorandum was circulated.

5 Since March of 2018, AirWire has made almost no meaningful headway in paying off the
6 hundreds of thousands of dollars it owes Mr. Oberoi in back wages, opting instead to use its
7 available funds to pay business investments it deems to be a higher priority.

8 Plaintiff seeks his back wages, overtime premiums and liquidated damages pursuant to his
9 statutory claims, waiting time penalties, attorneys’ fees and costs, and pre-judgment interest.

10 *Defendant’s Statement*

11 AirWire is a small, “high-tech,” Nevada start-up company that is currently designing in
12 order to deploy an artificial intelligence based virtual assistant for use in automobiles. The
13 product will be an “app” named Jarvis. The distinction between Jarvis and other common virtual
14 assistants is that Jarvis is driven by cognitive artificial intelligence using IBM’s Watson as its
15 platform. Accordingly, Jarvis is intuitive. It remembers the operator’s behavior in order to
16 predict the current needs and desires of that person. The potential applications for this
17 technology have attracted investments in the Company of over \$1.5 million during Mr. Oberoi’s
18 employment. These funds were largely used to cover operating and development costs.
19 Unfortunately, the Company was not, during the relevant time period, able to bring salable
20 products or services to market. AirWire’s revenue was \$2,100 in 2016, \$85,500 in 2017 and \$0
21 in 2018.

22 Mr. Oberoi received a letter form offer of employment from AirWire on February 9,
23 2016, for the position as the Vice-President of World-Wide Business Development. Mr. Oberoi
24 executed and returned the offer letter that same day. The position provided an annual salary of
25 \$175,000 and other benefits. One of the most potentially lucrative benefits was the Company
26 Stock Option Plan. This plan allowed executives, like Mr. Oberoi, the option to purchase
27 500,000 shares of the Company’s common stock at \$1.00 per share. The stock options vest over
28 five years, at the rate of approximately 20% per year. Vesting ceases upon termination of

1 employment, giving, however, participating employees the option of purchasing the shares that
2 vested, to-date, within 30 days of leaving the Company, or lose the option to acquire the vested
3 shares, altogether. This provision was intended to incentivize employees to remain with the
4 Company.

5 Plaintiff's primary duty was to develop customers (sales) for the Company's products
6 and/or services with businesses operating in South Asia. Plaintiff traveled to the region on
7 Company business. Further, he attended international trade shows with other Company
8 executives where representatives from companies operating in South Asia were in attendance.
9 When not traveling abroad, Plaintiff was in communications with his sales prospects in South
10 Asia by telephone and email. These communications were conducted incidental to and in
11 conjunction with Plaintiff's efforts to sell goods and services to businesses operating in South
12 Asia. Conversely, almost none of his time was spent with customers or suppliers in the United
13 States as was entirely consistent with the employer's expectations.

14 In addition to Plaintiff's efforts to sell AirWire's goods and/or services, he was charged
15 with attempting to locate investors, most of which were located on the Indian subcontinent.
16 Plaintiff's sales and financing efforts were performed in an office, his home office, and were part
17 of the management and general business operations of his employer. Moreover, Plaintiff's
18 duties required the exercise discretion and independent judgment in these matters of significance
19 to AirWire.

20 Plaintiff regularly received bi-monthly payments of salary from March through June of
21 2016, for a total gross income of \$68,939.43. In July of that year, the Company encountered a
22 critical shortage of capital which caused the Company to cease the payment of salaries to all of
23 its executives and officers. Like other corporate officers, Mr. Oberoi was told that he had the
24 option of leaving the Company and seeking employment elsewhere, in which case, Mr. Oberoi
25 had to purchase his vested shares of stock in the Company within 30 days of separation from
26 employment to avoid losing the option. Or Mr. Oberoi could choose to stay with the Company,
27 without regular compensation, but while continuing to accrue vested shares in the Company
28 pursuant to the Company's stock option plan. Like other corporate officers, Mr. Oberoi was told

1 that if he stayed, the Company would advance him funds, consistent with the cash flow needs of
2 the Company and Mr. Oberoi's need for funds to survive, until the Company raised adequate
3 capital or became a going concern and able to pay Mr. Oberoi his back wages, which payment
4 would be deferred until one or both of these conditions had been met. This was also the
5 Company's attempt to keep the team of executives together to further the Company's quest to
6 become a profitable, going concern.

7 Faced with this Hobson's choice, Mr. Oberoi took the stock option path and elected to
8 remain at work with the Company, accept advances and agree to defer payment on his salary. In
9 fact, he received cash advances from July 2016, on a reasonably regular basis. These advances
10 continued even after he stopped performing and essentially quit the Company in March of 2018.
11 For the period of October 2016 through February 2018, Mr. Oberoi received 19 advances totaling
12 \$57,264.00.

13 Then, after Mr. Oberoi left the Company, these payments continued, though he was doing
14 no work. From April 2018, through September 2018, Mr. Oberoi received seven more
15 installments amounting to \$22,000. Thus, for the period of October 2016 through September
16 2018, Mr. Oberoi was paid advances amounting to \$79,264.

17 The advances picked up again in January 2019, through August 2019. During this period,
18 the Company made nine advances of \$3,000 each, totaling another \$27,000. Payments ceased as
19 of August 2019. Over the period of July 2016 through August 2019, Mr. Oberoi, therefore,
20 received advances of \$106,243, for a period of 38 months. These cash advances are to be repaid,
21 as an eventual offset against the wages now owed, but not yet due.

22 During the time Mr. Oberoi worked for the Company, a period of 24 months from
23 February of 2016 through February 2018, when he just stopped performing, he was paid in salary
24 or advances the sum of \$126,203.43, that is \$68,939.43 at \$14,583 per month, plus \$57,264 in
25 advances. This amortizes out at the rate of \$5,258.48 per month or \$63,101.72 per year. Under
26 the FLSA, an exempt administrative employee need only earn \$23,660 (\$455/week times
27 52 weeks) in one year. Mr. Oberoi also received payments virtually every month from February
28 2016 through February 2018, when he walked away from the Company.

1 Should this matter be considered a breach of contract action, Mr. Oberoi would have been
2 paid a total of \$350,000 and has received \$175,213.43, thus, recoverable damages in connection
3 with a breach of contract claim would be limited to \$174,786.57.

4 **III. LEGAL ISSUES**

5 The Parties agree that this case does not appear to raise novel or unresolved issues of law
6 and will likely be resolved by the determination of disputed facts.

7 *Plaintiff's Position*

8 Plaintiff asserts that the key legal issues include the following: whether and in what
9 amount Plaintiff is owed unpaid wages and damages flowing therefrom such as liquidated
10 damages, overtime premiums, interest, waiting time penalties and attorney's fees; and whether
11 Plaintiff was misclassified as exempt under the California Labor Code and/or FLSA either on
12 account of Defendants' failure to meet the salary basis test associated with any exemptions or on
13 account of job duties.

14 Defendant's position that Plaintiff's unpaid salary somehow does not trigger a statutory
15 claim under California law to unpaid wages because the promise to pay him was contained in a
16 contract is legally untenable. See Cal. Lab. Code §§ 200 ("Wages" includes all amounts for
17 labor performed by employees... "Labor" includes labor, work, or service whether rendered or
18 performed under contract, subcontract, partnership, station plan, or other agreement if the labor to
19 be paid for is performed personally by the person demanding payment"); 218.5 (addressing
20 remedies available in civil actions for unpaid wages).

21 Additionally, with respect to Plaintiff's minimum wage and overtime claims, even if
22 Plaintiff's job duties qualify for various statutory exemptions, Defendant failed to meet the salary
23 basis test for the exemptions during the period that Plaintiff was not being compensated.
24 29 C.F.R. 541.602(a) ("An employee will be considered to be paid on a 'salary basis' within the
25 meaning of these regulations if the employee **regularly receives each pay period** on a weekly, or
26 less frequent basis, a predetermined amount...") (emphasis added); see also *Orton v. Johnny's*
27 *Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012) (reversing district court and clarifying
28

1 for purposes of the salary basis test: “The question is therefore not what Orton was owed under
2 his employment agreement; rather, the question is what compensation Orton actually received.”).

3 *Defendant’s Position*

4 The defendant asserts the following legal issues:

5 (1) Whether this is, in reality, an alleged breach of contract or oral contract or *quantum*
6 *meruit* case, to which the current FLSA and California Labor Code claims do not apply;

7 (2) Whether Mr. Oberoi was, at all relevant times, exempt under the FLSA and California
8 Labor code as a result of his high salary, sales and administrative functions;

9 (3) Whether Mr. Oberoi was, at all relevant times, exempt under the FLSA and California
10 Labor code as an outside salesperson.

11 (4) Whether the company is an employer subject to the FLSA and California Labor Code
12 as the result of its minimal income for the relevant time period;

13 (5) Whether Plaintiff was in fact paid sufficient wages under the FLSA and California
14 Labor Code;

15 (6) If Plaintiff is determined to be a covered employee under the FLSA and/or California
16 Labor Code, whether the Company is allowed to deduct the time spent on international travel and
17 working with international contacts from the amount of wages owed;

18 (7) Whether Defendant is allowed an offset in the approximate amount of \$170,000;

19 (8) Whether Plaintiff modified the terms of his employment contract through his consent
20 to non-payment;

21 (9) Whether Plaintiff’s employment contract was modified to add a condition precedent;

22 (10) If Plaintiff was at any relevant time not properly classified as exempt under the
23 FLSA and/or California Labor Code, whether Plaintiff worked enough hours in a workweek or
24 workday to be entitled to overtime;

25 (11) Whether Plaintiff is entitled to liquidated damages if the Company reasonably
26 believed he was a highly salaried, exempt employee of the Company;

27 (12) Whether Plaintiff is a highly salaried Vice President of the Company, and therefor
28 not entitled to the protection of the FLSA and the California Labor Code.

1 (13) Whether Defendant's conduct was not willful, such that the appropriate statute of
2 limitations for Plaintiff's FLSA claims is two years instead of three;

3 (14) Whether Plaintiff is not entitled to waiting time penalties pursuant to California
4 Labor Code section 203 because any nonpayment of wages due was not willful as required.

5 **IV. MOTIONS**

6 The Parties have yet to file any motions. Should the matter not be resolved by
7 March 1, 2023, Defendant anticipates filing a motion for summary judgement, either full or
8 partial. The Defendant anticipates filing said summary judgment motion on or before
9 March 9, 2023. The Parties may also file motions in limine as warranted.

10 **V. DISCOVERY**

11 The Parties have exchanged initial disclosures pursuant to FRCP 26(a) and Plaintiff
12 served written discovery on August 3, 2020, and received a document production in response to
13 the written discovery requests. On October 17, 2022, Plaintiff served a notice to depose
14 Defendant pursuant to FRCP 30(b)(6). The Parties believe that any remaining discovery will
15 largely be fact discovery, with minimal if any expert discovery expected, and therefore jointly
16 request that the fact discovery deadline be extended to February 7, 2023, to conclude
17 concurrently with the close of expert discovery.

18 **VI. SETTLEMENT AND ADR**

19 The Parties have complied with ADR L.R. 3-5 and participated in two Settlement
20 Conferences with Magistrate Judge Susan van Keulen. The first Settlement Conference resulted
21 in a conditional global settlement, but Defendant was unable to follow through on the conditions
22 associated with finalizing the settlement. At the second Settlement Conference, Plaintiff reached
23 a settlement with the individual defendants, who were thereafter dismissed from the case. The
24 Parties have also engaged in extensive direct negotiations and will continue to explore ADR as
25 the case progresses towards trial.

26 **VII. BIFURCATION AND SEPARATE TRIAL ISSUES**

27 As addressed below, the trial will be a bench trial and the Parties do not believe any
28 bifurcation or a separate trial of specific issues is warranted.

1 **VIII. TRIAL**

2 Plaintiff withdrew his demand for a jury trial and stipulated to a bench trial. The Parties
3 estimate four court days for trial.

4 **IX. SCHEDULING**

5 As addressed in Section V, the Parties jointly request that the fact discovery deadline be
6 extended to February 7, 2023. The Parties propose May 2, 2023, as the date for the Final Pretrial
7 Conference and May 23, 2023, as the start of the Trial.

8 **X. OTHER MATTERS**

9 Not presently applicable.

10 DATED: November 8, 2022

Respectfully submitted,

11 RUDY, EXELROD, ZIEFF & LOWE, LLP

12 By: /s/ Chaya M. Mandelbaum

13 CHAYA M. MANDELBAUM

Attorneys for Plaintiff

14 DATED: November 8, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

15 By: /s/ Robert I. Lockwood

16 JOSEPH R. LORDAN

17 ROBERT I. LOCKWOOD

Attorneys for Defendants

18 DATED: November 8, 2022

THE LAW OFFICES OF CHARLES R. ZEH, ESQ.

19 By: /s/ Charles R. Zeh

20 CHARLES R. ZEH

Attorneys for Defendants

21 **ECF ATTESTATION**

22 Pursuant to Civil L.R. 5-1(i)(3), the filer attests that concurrence in the filing of this
23 document has been obtained from each of the other signatories thereto.

24 Executed this 8th day of November 2022, at San Mateo, California.

25 /s/ Chaya M. Mandelbaum

26 CHAYA M. MANDELBAUM